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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

94-104

In the Matter of:	)	
	)	
Petition To Extend State Authority	)	PR File No. 94 SP2
Over Rate and Entry Regulation of All	)	DA-94-876
Commercial Mobile Radio Services of the	)	
Arizona Corporation Commission	)	
	)	
Petition of the Connecticut Department	)	
of Public Utility Control To Retain	)	PR File No. 94-SP4
Regulatory Control of The Rates of	)	DA-94-876
Wholesale Cellular Service Providers	)	
in the State of Connecticut	)	
	)	
Petition on Behalf of the Louisiana	)	
Public Service Commission for Authority	)	PR File No. 94-SP5
To Retain Existing Jurisdiction Over	)	DA-94-876
Commercial Mobile Radio Services Offered	)	
Within the State of Louisiana	)	
	)	
State Petition for Authority to Maintain	)	
Current Regulation of Rates and Market	)	PR File No. 94-SP8
Entry (Sect. 20.12) by the State Public	)	DA-94-876
Service Commission of Wyoming	)	

CONSOLIDATED COMMENTS OF GTE SERVICE CORPORATION IN OPPOSITION TO STATE PETITIONS FOR AUTHORITY TO CONTINUE REGULATING COMMERCIAL MOBILE RADIO SERVICES WITHIN THE STATES OF ARIZONA, CONNECTICUT, LOUISIANA, AND WYOMING

GTE SERVICE CORPORATION
ON BEHALF OF
GTE MOBILNET INCORPORATED
AND CONTEL CELLULAR INC.

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September 19, 1994

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CONSOLIDATED COMMENTS OF GTE SERVICE CORPORATION IN OPPOSITION TO STATE PETITIONS FOR AUTHORITY TO CONTINUE REGULATING COMMERCIAL MOBILE RADIO SERVICES WITHIN THE STATES OF ARIZONA, CONNECTICUT, LOUISIANA, AND WYOMING

GTE Service Corporation ("GTE"), on behalf of GTE Mobilnet Incorporated ("GTEM") and Contel Cellular Inc. ("CCI"), pursuant to the Federal Communications Commission's ("FCC") decision in Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services, 9 FCC Rcd. 1411 (1994), hereby submits its Comments in Opposition to State Petitions to Continue Regulation of Commercial Mobile Radio Service ("CMRS") of

Arizona, Connecticut, Louisiana and Wyoming ("states:), as filed with the FCC on August 10, 1994. Since GTE is engaged in the provision of domestic cellular radio telecommunications service, and may enter the cellular services markets in these States in the future, GTE is directly affected by the states' Petitions. For the reasons delineated below, GTE respectfully requests that the Petitions be dismissed or, in the alternative, denied, for failure to satisfy the demanding standards which the FCC set forth in Section 20.13 of its Rules. 47 C.F.R. § 20.13.

Introduction

The States' Petitions have failed to demonstrate a need to continue rate regulation of cellular services under Section 20.13 of the FCC Rules. 47 C.F.R. § 20.13.

Summary

Congress has precluded State regulation of CMRS unless the State can prove that (1) market conditions in the State fail to protect consumers adequately from unjust and unreasonable rates or (2) such service is a replacement for landline service for a substantial portion of landline service within the State. Neither condition has been shown to be present in the States that would warrant a continuation of State regulation. None of the Petitioners' filings have met these burdens to continue rate and

Entry regulation.

The Commission has pointed to nothing it can add to cellular regulation not already found in the FCC's regulations. To add another layer of regulation to cellular carriers merely causes regulatory lag and is contrary to the public interest. Duplicative regulation simply adds to the cost of service to the consumer and delays the introduction of new technology and services.

Discussion

I. CONGRESS INTENDED FOR THE FEDERAL COMMUNICATIONS COMMISSION TO BE THE SOLE REGULATOR OVER RATES AND ENTRY ASSOCIATED WITH THE PROVISION OF COMMERCIAL MOBILE RADIO SERVICES

A. CONGRESS HAS STATUTORILY PREEMPTED STATE REGULATION OF RATES AND ENTRY

In the Omnibus Budget Reconciliation Act of 1993 ("OBR")[1/], Congress determined that regulation of rates and entry into the Commercial Mobile Radio Services ("CMRS") market would be most appropriately delegated to the federal government, specifically, to the Federal Communications Commission ("FCC"). Consequently, Congress preempted State regulation of rates and market entry, except in very limited circumstances.

Section 332(c)(3)(A) of the OBR provides, in relevant part:

> Notwithstanding sections 152(b) and 221(b), no State or local government shall have any

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[1/] Omnibus Budget Reconciliation Act of 1993, Pub.L.No. 103-66, Title VI, § 6002(b)(2). 107 Stat. 312, 392 (1993) amending Section 3329C) of the Communications Act.

> authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 U.S.C. § 332(c)(3)(A).

B. CONGRESS GRANTED STATES A VERY LIMITED OPPORTUNITY TO PETITION FOR AUTHORITY TO REGULATE RATES

The OBR grants States a very limited opportunity to seek authority to continue rate regulation. The OBR erected high hurdles which a State must vault in order to be successful:

> [a] State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that -
>
> > (i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or
> >
> > (ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State. . . .

47 U.S.C. § 332(c)(3)(A)(i)-(ii). Furthermore, even with a sufficient evidentiary showing of market failure, a State must have satisfied the following procedural requirement:

> If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. . . .

47 U.S.C. § 332(c)(3)(B).

An FCC grant of State regulatory authority, however, is temporary. After a reasonable amount of time, interested parties may petition the FCC for revocation of the authority to regulate rates. Should the FCC find that the State regulation is no longer necessary to ensure just and reasonable rates, the authority to regulate must be revoked. Id.

C. THE CLEAR INTENT OF CONGRESS WAS TO GRANT THE FCC SOLE JURISDICTION OVER THE RATES AND ENTRY ASSOCIATED WITH CMRS

It is clear from both the legislative history of the OBR and the OBR language itself that it was the intent of Congress that all rate and entry regulation with respect to CMRS be accomplished at the federal level, by the FCC. Indeed, the Conference agreement between the House of Representatives and Senate expressly states:

> It is the intent of the Conferees that the Commission, in considering the scope, duration or limitation of any State regulation shall ensure that such regulation is consistent with the overall intent of this subsection as implemented by the Commission, so that, consistent with the public interest, similar services are accorded similar regulatory treatment.

House and Senate Conference Report, p. 26.

Clearly, Congress envisioned uniform regulation of providers of similar services throughout the country, such that those carriers may compete on a level playing field. Such uniform regulation is most effectively accomplished by a single regulatory body, the FCC, rather than by subjecting carriers to both federal and State rate regulation.

II. BOTH CONGRESS AND THE FCC HAVE FOUND THE CELLULAR MARKET TO BE SUFFICIENTLY COMPETITIVE SO AS TO WARRANT FORBEARANCE FROM MANY TITLE II PROVISIONS AND PREEMPTION

A. CONGRESS FINDS COMPETITION WARRANTS FORBEARANCE AND PREEMPTION

When Congress enacted the OBR, thereby empowering the FCC to exercise regulatory authority over CMRS rates, Congress stated that inherent in the FCC's regulatory authority is the power to exercise its discretion with respect to forbearance from certain provisions of Title II. Congress granted the FCC authority to forbear from specific regulation based upon its conclusion that the CMRS marketplace had experienced, and will continue to experience, increased competition. Consequently, forbearance is warranted where the cost associated with complying with certain regulatory burdens exceeds the benefit to be derived from adherence to those requirements. Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services, ("NPRM"), 72 RR 2d 147 (1993), para. 52. Thus, Congress has expressed a strong belief that the FCC should forebear from regulating certain aspects of the CMRS marketplace.

In accord with these conclusions, Congress preempted all State rate and entry regulation in favor of uniform regulation by the FCC. Congress believed that to permit the States to regulate aspects of CMRS service would enable the States to obliterate any semblance of regulatory uniformity which Congress sought to create, and would subject carriers to a frequently conflicting checkerboard of regulatory frameworks. Congress delegated to the FCC the responsibility for determining, with respect to particular services

and marketplaces, whether forbearance and preemption are justified.

B. THE FCC FINDS FORBEARANCE WARRANTED AND PREEMPTION JUSTIFIED

In accord with Congress' mandate, the FCC has adopted rules governing the provision of CMRS which adhere to and foster the policies which Congress promulgated. The FCC's determination that the cellular marketplace is competitive was paramount in its consideration of the amount and type of prospective regulatory oversight which should be accorded CMRS providers. With respect to such future regulation, the FCC noted that "open entry and competition often bring greater benefits to customers and society than traditional regulation of a market limited to one or a few carriers." NPRM, para. 51. Consequently, the FCC has forborne from enforcing many provisions within Title II including, inter alia, Section 203 of the Communications Act of 1934, 47 U.S.C. § 151, et seq; which requires carriers to file with the FCC a schedule of charges, terms and conditions associated with interstate service. Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services, ("2nd R&O"), 9 FCC Rcd. 1411, para. 175 (1994).[2]/

The FCC's decision to forbear from enforcing specific provisions of Title II was based upon its tentative finding that "the level of competition in the commercial mobile radio services marketplace is sufficient to permit us to forbear from tariff

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[2]/ The FCC's 2nd R&O did not alter the obligations imposed upon carriers pursuant to the Telephone Operator Consumer Services Improvement Act of 1990. See, In the Matter of Policies and Rules Concerning Operator Service Providers, 6 F.C.C. Rcd. 2744 (1991).

regulation of the rates for CMRS provided to end users." NPRM, para. 62; 2nd R&O, para. 175. The FCC acknowledged that PCS, cellular, paging and specialized mobile service carriers would comprise a large class of carriers which would vie for customers, and that none of these competitors would be dominant in the marketplace. NPRM, para. 62. With respect to cellular service in particular, the FCC tentatively found that CMRS "may be sufficiently competitive to permit us to forbear from regulating the rates for these services," and noted that its position was supported by the fact that the vast majority of States have not seen the need to regulate cellular rates. NPRM, para. 63.

In the Second Report and Order, which formally adopted the forbearance policy, the FCC buttressed its tentative conclusions concerning competition in the cellular marketplace, and crystallized its analysis that the cellular marketplace is sufficiently competitive to warrant forbearance from regulation. First, the FCC clarified that its previous classification of cellular carriers as "dominant" was not based upon any evaluation of the competitiveness of the cellular marketplace. 2nd R&O, para. 145. Next, the FCC cited its previous FCC findings that cellular carriers face competition[3]/ and, therefore, the public interest is served by relaxing some policies traditionally applied to non-competitive markets. 2nd R&O, para. 145.

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[3]/ For example, competition is fostered by permitting the bundling of cellular service and equipment. Bundling of Cellular Customer Premises Equipment and Cellular Service, 7 FCC Rcd. 4028 (1992).

The FCC found that this competition has resulted in decreased costs of cellular service for consumers and a more complex pricing structure tailored to the unique needs of consumers. Id., para. 145. With respect to the practical implications of regulation in a competitive marketplace, the FCC was cognizant of the fact that tariffing "imposes administrative costs and can be a barrier to competition in some circumstances." Id., para. 175. Based upon the foregoing, the FCC found that the cellular marketplace was sufficiently competitive to warrant forbearance from the enforcement of tariff-filing requirements. Id., paras. 154, 162.

The FCC further found that forbearance in this instance is in the public interest because tariffs (and the associated notice periods) reduce a carrier's ability to respond quickly to changes in market demand and costs associated with the provision of service, and reduce a carrier's incentive to provide new offerings and price discounting since competitors who are appraised of future business plans have the ability to negate the competitive impact of a carrier's innovative offerings prior to their implementation. Id., para. 177. In addition, the FCC found that a market environment free from tariff filing obligations enhances competition in the marketplace, which inevitably increases the benefits derived by consumers. Id., para. 177. In contrast, filing and reporting requirements increase costs to carriers -- costs which could be passed onto the consumer in the form of higher rates. Id., para. 177. Moreover, the FCC found that tariff notice provisions which provide competitors with access to proposed rate

restructuring and future proposed rates may actually encourage artificially high rates and may facilitate tacit collusion between the two facilities-based carriers. Id., para. 177.

Significantly, the FCC considered and dismissed one State's allegations of potential collusion by the two facilities-based carriers in each cellular market. The FCC found collusion unlikely for three reasons: 1) there exist several services which compete with cellular service; 2) cellular carriers face the threat of future competition by, among others, PCS carriers; and 3) as a result of ever-improving technology, cellular carriers must continually improve the quality of their service in order to maintain demand. Id., para. 145.

By forbearing the FCC does not intend to abandon the rates and market entry arenas. Rather, the FCC explicitly left in place key statutory safeguards. Cellular carriers remain subject to the obligations imposed upon them as common carriers pursuant to Sections 201 and 202 of the Communications Act, 47 U.S.C. § 201, 202, which require that the rates charged for service be just and reasonable and which prohibit unjust or unreasonably discriminatory rates. Id., para. 176. The FCC made it clear that it intends to enforce these statutory provisions:

> In the event that a carrier violated Sections 201 or 202, the Section 208 complaint process would permit challenges to a carrier's rates or practices and full compensation for any harm due to violations of the Act. Although we will forbear from enforcing our refund and prescription authority, described in Sections 204 and 205, we do not forbear from Sections 206, 207, and 209, so that successful complainants could collect damages.

Id., para. 176.

Moreover, simultaneous with the adoption of its forbearance policy, the FCC retained for itself, pursuant to Congressional mandate, the authority to ensure that cellular rates would remain just and reasonable, in accord with the public interest. Thus, all criteria required to be satisfied prior to the implementation of a forbearance policy have been fulfilled: 1) retention of statutory requirements contained within Sections 201 and 202 of the Communications Act (and their complementary enforcement provisions, set out in Sections 206, 207, 208 and 209 of that Act) ensure that rates will be just and reasonable; 2) since just and reasonable rates are, by definition, in the public interest, consumers need not be protected from such rates; and 3) forbearance was determined to be in the public interest because decreased regulation will provide cellular carriers with increased flexibility to respond to market conditions and customer demand.

The satisfaction of these criteria necessarily negates the validity of those allegations upon which a State petition for authority to regulate rates must be grounded: such petitions must contain evidence that rates are unjust and unreasonably discriminatory, and that consumers require protection from them. The petition assumes a violation of the Communications Act -- which, even if true, is more appropriately remedied by enforcement of the Communications Act under the regulatory authority statutorily granted to, and retained by, the FCC.

III. THE PETITIONS TO REGULATE RATES DO NOT SATISFY THE DEMANDING REQUIREMENTS OF THE FCC'S RULES

A. STATES SEEKING TO CONTINUE REGULATION OF CMRS RATES AND ENTRY MUST SUBMIT A MARKET-ANALYSIS-INTENSIVE PETITION REQUESTING SUCH AUTHORITY, AND MUST MEET A HIGH BURDEN OF PROOF

In light of the statutory language and Congress' clear intent to create a symmetrical regulatory scheme in the provision of CMRS, see OBR, the FCC's implementation of Sections 3(n) and 332 of the Communications Act, and the economic benefits to be obtained from relaxed regulation, States seeking to continue rate regulation of cellular services must satisfy a heavy burden of proof. Section 20.13 of the FCC's Rules requires a State to demonstrate by empirical, concrete evidence that rates in that State are unjust, unreasonable or discriminatory. The burden of proof must be sufficient to overcome the FCC's finding that the CMRS marketplace is, in fact, competitive and capable of producing just and reasonable rates. See 2nd R&O, paras. 124-154.

In the process of deciding whether to forbear from certain aspects of Title II, the FCC examined the competitive nature of the cellular service marketplace. See Id., paras. 124-213. By ultimately choosing to forbear, the FCC necessarily found that the nationwide cellular marketplace is competitive within the meaning of Section 332. Specifically, the FCC found that continued application of certain provisions of Title II is not required because (1) "charges, practices, classifications, or regulations for or in connection with [cellular service] are just and reasonable and are not unjustly or unreasonably discriminatory;"

(2) "[e]nforcement of such provision is not necessary for the protection of consumers;" and (3) "[s]pecifying such provision is consistent with the public interest." 47 U.S.C. §332(c)(1)A)(1)-(3); 2nd R&O, paras. 135-39.

It also follows that by forbearing, the FCC established a presumption of competition--and hence of federal preemption--within the CMRS/cellular markets of the individual States. A State may overcome this presumption only after making the following recommended substantive showing:

> (1) Demonstrative evidence that market conditions in the State for commercial mobile radio services do not adequately protect subscribers to such services from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory. Alternatively, a State's petition may include demonstrative evidence showing that market conditions for commercial mobile radio services do not protect subscribers adequately from unjust and unreasonable rates, or rates that are unjustly or unreasonably discriminatory, and that a substantial portion of the commercial mobile radio service subscribers in the State or a specified geographic area have no alternatives means of obtaining basic telephone service. This showing may include evidence of the range of basic telephone service alternatives available to consumers in the State.
>
> (2) The following is a non-exhaustive list of examples of the types of evidence, information, and analysis that may be considered pertinent to determine conditions and consumer protection by the Commission in reviewing any petition filed by a State under this section:
>
> (i) The number of commercial mobile radio service providers in the State, the types of services offered by commercial mobile radio service providers in the State, and the period of time that these providers have offered service in the State.
>
> (ii) The number of customers of each commercial mobile radio service provider in the State; trends in each provider's customer base during the most recent

annual period or other data covering another reasonable period if annual data is unavailable; and annual revenues and rates of return for each commercial mobile radio service provider.

(iii) Rate information for each commercial mobile radio service provider, including trends in each provider's rates during the most recent annual period or other data covering another reasonable period if annual data is unavailable.

(iv) An assessment of the extent to which services offered by the commercial mobile radio service providers the State proposes to regulate are substitutable for services offered by other carriers in the State.

(v) Opportunities for new providers to enter into the provision of competing services, and an analysis of any barriers to such entry.

(vi) Specific allegations of fact (supported by affidavit of person with personal knowledge) regarding anti-competitive or discriminatory practices or behavior by commercial mobile radio service providers in the State.

(vii) Evidence, information, and analysis demonstrating with particularity instances of systematic unjust and unreasonable rates, or rates that are unjust or unreasonably discriminatory, imposed upon commercial mobile radio service subscribers. Such evidence should include an examination of the relationship between rates and costs. Additionally, evidence of a pattern of such rates, that demonstrates the inability of the commercial mobile radio service marketplace in the State to produce reasonable rates through competitive forces will be considered especially probative.

(viii) Information regarding customer satisfaction or dissatisfaction with services offered by commercial mobile

> radio service providers, including statistics and other information about complaints filed with the State regulatory commission.

47 C.F.R. § 20.13.

For the following reasons, Petitioner fail to satisfy the FCC's strict standard for continuing rate regulation, and, accordingly, the Petitions should be denied.[4]/

B. THE PETITIONS TO CONTINUE RATE AND ENTRY REGULATION CONTAIN INSUFFICIENT EVIDENCE OF A LACK OF COMPETITION IN THE CELLULAR MARKET

1. Cellular Services is a competitive marketplace.

In the OBR, Congress implicitly endorsed the duopoly system of cellular licensing. Congress did so by retaining the existing system of licensing two facilities within each CGSA and placing that cellular system within the broader framework of a liberalized uniform regulatory scheme controlling the provision of similar mobile services, which, in addition to cellular, include Private Carrier Paging (PCP) services, Specialized Mobile Radio (SMR), Enhanced Special Mobile Radio (ESMR), and broadband and narrowband personal communications services (PCS).

Petitioners predicate their entire market power analysis on a faulty definition of the relevant market. Petitioners would view cellular services in a vacuum, unaffected by developments in comparable technologies and FCC policy that have and continue to create a dynamic CMRS marketplace. Instead, mobile services must

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[4] Section 20.13(a)(1) requires Petitioners to demonstrate that market conditions "do not adequately protect" cellular subscribers from unjust and unreasonable rates.

be viewed, practically, as a system of competing technologies. In addition, the FCC's decision to allocate additional spectrum for the provision of wireless services will result in increased numbers of wireless service providers within each CGSA market, reduced spectrum scarcity and, accordingly, increased competition. As one market study found,

> . . . the industry is about to experience a significant increase both in the number of firms that supply mobile communications services and in the amount of spectrum that has been allocated for this purpose. At least three, and perhaps as many as six, new firms will operate in each geographic area, and the amount of spectrum available for the provision of mobile services will more than triple.
>
> Moreover, even this understates the amount of additional capacity that will be available to serve subscribers since the new operators will use digital technologies that are more efficient than the analog technologies that have been used by incumbent cellular operators. To his must be added the effect of the introduction of Enhanced Special Mobile Radio (ESMR) in the near term and satellite mobile service somewhat later, both of which will add further to the number of firms providing mobile services and the amount of spectrum devoted to this purpose. By any standard, industry concentration will decline greatly--and limitations on industry growth that have resulted from government-imposed limits on available spectrum will be greatly relaxed.

Stanley M. Besen, Charles River Associates, "Concentration, Competition, and Performance in the Mobile Telecommunications Service Market" ("CR Study"), at 8. (Copy attached as Exhibit A).

2. <u>The Petitioners' claim that continued rate and entry regulation will promote competition is plainly wrong</u>.

While already competitive, the cellular marketplace will

experience expanded competition in the near future. The result will be greater consumer options at lower rates. Included in the expansion will be a wider variety of consumer options, thus the interest of consumers rather than being served by additional State regulation, may in fact be harmed. Petitioners' suggestion that even greater expansion will occur through state regulation is plainly wrong. Moreover, the Petitioners' allegations do not reflect any consideration of other factors which drive building the network, the need to continually upgrade the system in order to provide the most recent technological advancements available; the need to plan for future demand in light of the growth trend of the area; and the promotion of seamless coverage. The Petitioners' also completely ignore service quality competition in its analysis. They to acknowledge the role of capacity in enabling carriers to increase coverage areas, provide better voice quality, and decrease the occurrence of busy channels and dropped calls, all of which allow a cellular carrier to differentiate its service from that of its competitors.

The Petitioners' analyses fail to reflect the fact that both the Communications Act of 1934, as amended, and the FCC's rules require and encourage the build-out of cellular systems. The Communications Act requires common carriers to provide service to all who reasonably request it. 47 U.S.C. §201. A carrier cannot provide service to all potential customers if that carrier has not placed into operation an adequate number of cellular facilities. Similarly, the FCC's rules require that cellular carriers provide

coverage to 75 percent of their proposed CGSAs within three years from the grant of their construction permits regardless of the demand in those areas. 47 C.F.R. §22.903. Cellular carriers are also motivated to construct rapidly by the Commission's five year "fill in" policy. After five years from the date of grant of the construction permit, cellular carriers lose the right to fill-in unserved areas within their markets without facing opposing applications. 47 C.F.R. §§22.11(d)(7)(iii); 22.903(d)(3). Thus, the FCC encourages its cellular licensees to rapidly construct marketwide cellular systems and to provide high quality cellular service.

Cellular carriers have dramatically increased capacity, in response to consumer demand. On a national basis, the cellular industry has grown from one serving fewer than 100,000 subscribers in December 1984, to one serving over 16 million customers as of December 1993. See CR Study, p. 5.[5] This corresponds to an annual growth rate of 77 percent for subscribers. Id., p. 6. Moreover, between December 1992 and December 1993, the cellular industry experienced a huge surge in subscriber growth, increasing the number of cellular subscribers by almost 50 percent. Id., p. 6. Accompanying this increase in service availability are numerous technological advances which largely enhanced the capacity of cellular spectrum, namely: adjusted power input, antenna tilting, dynamic channel assignment via cell splitting and cell

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[5] The CR Study cites as the source of this information the Cellular Telecommunications Industry Association End-of-Year Data Survey.

sectorization, and the development of digital technologies. Id., p. 5.

In addition to minimizing the number of current competitors to cellular service providers, the Petitioners' similarly underestimate the opportunities for new competitors to enter the wireless marketplace. The Petitioners' also fail to consider that some of these providers already have infrastructure in place, such as cable, local landline and interexchange service providers.

Recent FCC policy decisions will result in increased numbers of wireless service providers within each market and an increase in already substantial extant competition. The FCC's vision of the mobile telecommunications services market as a broad and growing market is reflected in four policy decisions rendered pursuant to its implementation of the OBR. Id., p. 1. Those reflective decisions are:

> First, the FCC allocated a substantial amount of additional spectrum for the provision of these services, further expanding the resources that are available for their provision. Second, it plans to auction a number of large spectrum blocks, and will permit subsequent combinations of blocks, to permit economies of scale in the provision of mobile services to be exploited. Third, while recognizing the importance of these scale economies, in order to limit industry concentration the Commission has constrained both the amount of PCS spectrum that can be licensed to any single entity in a given geographic area and the amount of spectrum that can be licensed to cellular incumbents in either the PCS auctions or the aftermarket.
>
> Finally, and perhaps most importantly, by broadly defining PCS as 'a family of mobile or portable radio communications services which could provide services to individuals and business, and be integrated with a variety of competing networks,' the Commission has chosen

> to give substantial latitude to operators to offer a wide range of service under the PCS rubric.

Id., p. 3. In light of the FCC's broad definition of PCS, PCS providers will be able to offer not only value-added services such as voice mail, call waiting, call forwarding, portable facsimile and wireless transmission services offered by conventional cellular service providers, but also may supplement those services with additional communications opportunities for customers in a host of environments (e.g., in-building, neighborhood, pedestrian), and a panoply of voice or data instruments offering various integrated enhanced service. Id., p. 4. Further, the Commission has recently taken additional action that will strengthen broadband PCS and wide-area SMR competitors. The Commission tentatively lifted wireline restrictions on the ownership of wide-area SMR licenses.[6] In addition, the FCC has determined that PCS spectrum blocks should all be contiguous, eliminating the need for PCS carriers to provide costly dual-frequency equipment.[7] As a result of the encouraged introduction of new service providers to the marketplace, competition will be increased, as explained in the following scenario:

> . . . the industry is about to experience a significant increase both in the number of firms that supply mobile communications

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[6] Eligibility for the Specialized Mobile Radio Services, (Notice of Proposed Rulemaking), GN Docket No. 94-90, 1, 11-15 (released Aug. 11, 1994).

[7] Amendment of the Commission's Rules to Establish New Personal Communications Services, (Memorandum Opinion and Order), GEN Docket No. 90-314, 1, 17 (June 13, 1994).

> services and in the amount of spectrum that has been allocated for this purpose. At least three, and perhaps as many as six, new firms will operate in each geographic area, and the amount of spectrum available for the provision of mobile services will more than triple.
>
> Moreover, even this understates the amount of additional capacity that will be available to serve subscribers since the new operators will use digital technologies that are more efficient than the analog technologies that have been used by incumbent cellular operators. (Footnote omitted) To this must be added the effect of the introduction of Enhanced Special Mobile Radio (wide area SMR) in the near term and satellite mobile service somewhat later, both of which will add further to the number of firms providing mobile services and the amount of spectrum devoted to this purpose. By any standard, industry concentration will decline greatly -- and limitations on industry growth that have resulted from government-imposed limits on available spectrum will be greatly relaxed.

Id., p. 8.

3. The Petitioners offer insufficient evidence of discriminatory or anti-competitive behavior.

Congress envisioned greater competition in the provision of cellular services by less rather than more regulation; by an integrated regulatory approach; and rationalization of the existing system. The FCC in turn concluded, after analysis, that relaxed regulation would best serve the public interest. 2nd R&O, para. 17. Simultaneously, FCC Rules will be vigilantly enforced to prevent any abuse of the public interest by a cellular provider following deregulation. Id., para. 162.

The FCC explicitly stated that by forbearing it did not intend to abandon the field of rate and market entry regulation. Id., paras. 164-213. Rather, the FCC refused to forbear with respect to

certain regulations, as judged by each individual section's importance to current and projected competition in the cellular marketplace. For instance, cellular carriers remain subject to the obligations imposed upon all common carriers pursuant to Sections 201 and 202 of the Communications Act, which require that the rates charged be just and reasonable and prohibit unjust or unreasonably discriminatory rates. Id., paras. 173-178. Sections 201 and 202, the FCC explained, "will provide an important protection in the event that there is a market failure." Id. Further sections not forborne include 206, 207, 208, 209, 210, 213, 215, 218, 219, 220, 221, 223, 225, 226, 227, 228, and so on. Id., paras. 164-213. Indeed, Sections 206, 207 and 209 permit successful complainants to collect monetary damages for market abuses.

Competition encourages each party to strive for greater market share by providing consumers with, for instance, better service and rates. The effect, as Congress intended, is dynamic. Moreover, State regulation can impose burdensome costs which may ultimately harm competition. To illustrate, cellular rates in States that regulate cellular prices are approximately five to sixteen percent higher than rates in States that are free of regulation.[8]

Moreover, there is no economic basis for claiming that limiting facilities-based suppliers to two does not produce a competitive market. Theoretical models of the strategic interactions between duopolists predict a broad range of outcomes,

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[8]/ See Affidavit of Jerry A. Hausman, United States v. W. Elec. Co., Inc., Civil Action No. 82-0192, at 10 (July 29, 1992).